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No. 99-12

# In the Supreme Court of the United States

UNITY REAL ESTATE COMPANY, ET AL., PETITIONERS

*v.*

MARTY D. HUDSON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, that assign responsibility for funding the health-care benefits of retired coal miners and their dependents to the coal mine operators that previously employed the miners pursuant to collective bargaining agreements that promised the miners health-care benefits for life violate the Due Process or Just Compensation Clauses of the Fifth Amendment.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 178 F.3d 649. The opinion of the district court in the *Unity Real Estate* case (Pet. App. 61a-78a) is reported at 977 F. Supp. 717. The opinion of the district court in the *Barnes & Tucker* case (Pet. App. 79a-95a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 29, 1999. The petition for a writ of certiorari was filed on June 28, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, to address a crisis in the funding of two multi-employer welfare benefit plans that paid for the health-care benefits of coal miners, retired miners, and their dependents. Those multi-employer plans, the United Mine Workers of America 1950 Benefit Plan and Trust (1950 Benefit Trust) and the United Mine Workers of America 1974 Benefit Plan and Trust (1974 Benefit Trust), were created and funded through a series of national collective bargaining agreements, known as National Bituminous Coal Wage Agreements (NBCWAs), between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA). See generally *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 505-509 (1998) (plurality opinion).

Before 1974, a single multi-employer fund was the exclusive source of pension and health-care benefits for UMWA miners, retirees, and their dependents. See *Eastern*, 524 U.S. at 505-506 (plurality opinion). In the 1974 NBCWA, the UMWA and the BCOA agreed to separate that fund into two multi-employer pension funds and two multi-employer welfare benefit funds. Under the 1974 NBCWA, the 1950 Benefit Trust provided health-care benefits to miners who retired before 1976, and the 1974 Benefit Trust provided health-care benefits to both the active work force and miners who retired in 1976 or thereafter. *Id.* at 509 (plurality opinion). Unlike previous agreements, the 1974 NBCWA expressly stated that miners and their spouses would be entitled to health-care benefits for life. *Id.* at 510 (plurality opinion); see also Pet. App. 102a (1974 NBCWA, providing that "[a]ny pensioned

miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a [H]ealth Services card until her death or remarriage"); *In re Chateaugay Corp.*, 53 F.3d 478, 482 (2d Cir.), cert. denied, 516 U.S. 913 (1995).

The structure of the 1950 and 1974 Benefit Trusts was changed in the 1978 NBCWA. In that agreement, employers who were bound by the NBCWA (known as signatory operators) agreed to provide benefits to their active employees and future retirees through individual employer health plans, rather than the 1974 Benefit Trust. The 1974 Benefit Trust was retained to provide health-care benefits to post-1975 "orphaned" retirees, whose last employer had gone out of business. See *Eastern*, 524 U.S. at 510 (plurality opinion). The 1950 Benefit Trust for miners who retired before 1976 (and their dependents) was also retained. See *id.* at 511 (plurality opinion). The 1978 NBCWA, like the 1974 agreement, expressly promised that miners covered by the agreement would receive health-care benefits for life. See *Chateaugay*, 53 F.3d at 482; Pet. App. 122a-123a.[1]

In the 1980s, the financial stability of the 1950 and 1974 Benefit Trusts was plagued by spiraling health-care costs, the phenomenon of coal operators "dumping" their retirees into the 1974 Benefit Trust by terminating their individual welfare benefit plans or leaving the coal business, and judicial decisions maintaining the trusts' beneficiary population without corresponding increases in coal operator contributions. The withdrawal of coal operators from the 1950 and 1974 Benefit

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[1] The 1981 and 1984 NBCWAs had similar express promises of health-care benefits for life. See Pet. App. 141a, 142a, 145a, 146a (1981 NBCWA); 162a, 163a, 166a, 167a (1984 NBCWA).

Trusts forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for not only their own retirees, but also newly "orphaned" retirees whose employers had ceased contributing to the Trusts. Those rising costs, in turn, influenced several still-contributing signatory operators to withdraw from the Trusts, thus further shrinking the trust-fund contribution base. See *Eastern*, 524 U.S. at 511 (plurality opinion). The Trusts' ability to provide health-care benefits was jeopardized, and the issue of retiree health-care benefits contributed to a protracted strike at the Pittston Coal Company. *Ibid.* (plurality opinion).

2. In 1990, the Secretary of Labor established the Advisory Commission on United Mine Workers Retiree Health Benefits (Coal Commission) to examine the financial crisis confronting the Trusts and to recommend solutions. See *Eastern*, 524 U.S. at 511-512 (plurality opinion). As relevant here, the Coal Commission recommended, as one alternative solution, that current and past signatories to the NBCWAs should bear the cost of providing health-care benefits to "orphaned" retirees whose former employers were no longer in the coal business, as well as to their own retirees. See *id.* at 512-513 (plurality opinion). The Coal Act was based in large part on that alternative recommendation by the Coal Commission. See *id.* at 513-514 (plurality opinion); 138 Cong. Rec. 5331 (1992) (statement of Sen. Wofford).

The Coal Act was designed to provide stable financing for the health-care benefits of all retired coal miners and their dependents who were covered by either the 1950 or 1974 Benefit Trust, or by an individual employer plan under the NBCWAs. To that end, the Coal Act creates two new, private multi-employer health-

care benefit trusts. The first new fund, the United Mine Workers of America Combined Benefit Fund (Combined Fund), the trust at issue in *Eastern*, was created by the statutory merger of the 1950 and 1974 United Mine Workers Benefit Trusts. It provides benefits to beneficiaries who were receiving (and were eligible to receive) benefits from those trusts when the Coal Act was enacted. See 26 U.S.C. 9702. Benefits are financed through annual premiums paid by signatory employers that remain in business, or by a "related person" if the employer is no longer in business; the amount of the premiums is determined by the Commissioner of Social Security under a formula established by the Coal Act. 26 U.S.C. 9706(a).

The second new fund, the United Mine Workers of America 1992 Benefit Plan (1992 Plan), is an entirely new entity designed to provide lifetime health-care benefits to individuals who should receive coverage under an individual employer plan but do not. See 26 U.S.C. 9712(b)(2)(B).[2] To provide financing for benefits under the 1992 Plan, the Coal Act assigns responsibility for funding the health-care benefits of a miner and his

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[2] The Coal Act elsewhere requires a mine operator that was providing health-care benefits to a miner or miner's dependents under an individual employer plan maintained under a 1978 or subsequent NBCWA, as of February 1, 1993, to continue to provide such benefits for as long as the operator remains in business. 26 U.S.C. 9711(a). If such an operator goes out of business or does not provide such benefits, a miner eligible to receive benefits from the operator's individual employer plan will receive benefits from the 1992 Plan. See 26 U.S.C. 9712(b)(2)(B). The 1992 Plan also provides health benefits to individuals who, but for the enactment of the Coal Act, would have been eligible to receive benefits under the 1950 or 1974 Benefit Trusts as of February 1993. See 26 U.S.C. 9712(b)(2)(A).

dependents to the signatory employer that most recently employed the miner. See 26 U.S.C. 9712(d).

The Coal Act directs the creation of the Combined Fund and the 1992 Plan as private multi-employer benefit plans and provides for the appointment of the plans' trustees. 26 U.S.C. 9702(a), 9712(a)(1). The Act further provides that the Combined Fund and the 1992 Plan have the same legal status as any other private multi-employer welfare benefit plan under the Employee Retirement Income Security Act of 1974 and the Labor-Management Relations Act of 1947. 26 U.S.C. 9702(a)(3), 9712(a)(2); see 29 U.S.C. 1002(1) and (37); 29 U.S.C. 186(c)(5).

3. Petitioner Unity Real Estate Company was assigned responsibility for the health-care benefits of 74 beneficiaries of the Combined Fund and two beneficiaries of the 1992 Plan. Pet. App. 9a. Those assignments were based upon the miners' employment by Unity or by one of its "related" entities (as defined by the Coal Act, see 26 U.S.C. 9701(c)(2)). Thirty of the miners assigned to Unity had worked for Unity or for a related company for more than ten years, and 13 for more than 15 years; the average duration of the employment of the miners assigned to Unity was approximately ten years. Pet. App. 9a & n.3. One of Unity's related entities, South Union Coal Company (Pennsylvania), operated coal mines from 1923 until its absorption into a Unity subsidiary, and signed the NBCWAs of 1947 through 1961. *Id.* at 8a. It was succeeded in mining operations by South Union Coal Company (West Virginia), a wholly owned subsidiary of Unity, which signed the 1974, 1978, and 1981 NBCWAs. *Ibid.* Another related company, Stewart Coal & Coke Company, operated a coal mine and coke plant and made payments to the UMWA Funds from 1949 to 1958, ceasing when it

ended coal mining operations; its former employees continued to receive benefits from the Funds. *Ibid.* Other related companies signed NBCWAs and paid into benefit Funds throughout the 1960s and 1970s. *Ibid.*[3]

4. Petitioner Barnes & Tucker Company was assigned 1544 Combined Fund beneficiaries and 20 1992 Plan beneficiaries. Pet. App. 9a. Barnes and its subsidiary corporations were engaged in large-scale coal production from 1905 until 1986, when its last mining operation was closed; its last agreement to manage a mine terminated on January 1, 1987. *Ibid.* At the peak of its coal mining operations, Barnes employed approximately 1100 UMWA-represented miners. As a member of the BCOA, Barnes was also a party to the NBCWAs of 1971, 1974, 1978, and 1981, and contributed to the UMWA Funds. *Ibid.* Barnes withdrew from the operators' association prior to the 1984 NBCWA, but it agreed to be bound by the 1984 NBCWA. *Ibid.* Upon the termination of the 1984 NBCWA in 1988, Barnes discontinued its individual employer benefit plan, and its retirees were left to be covered by the 1974 Benefit Plan as "orphaned" beneficiaries. *Ibid.* Since 1986,

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[3] Unity is a corporation owned by the Jamison family, as were the entities related to Unity. The relationships between and among the Jamison family and the various related entities enabled the Jamison family to receive substantial payments, in excess of $230,000, from Unity for promissory notes given by Stewart Coal & Coke. In addition, Unity was able to shelter $288,000 in income from federal income tax because of net operating loss carryover from the bankruptcy of its subsidiary South Union (W. Va.). Pet. App. 8a n.2.

Unity's current net worth is approximately $85,000, its annual gross revenues are approximately $50,000, and as of September 1995, it owed the Combined Fund and 1992 Plan over $440,000 in unpaid premiums. Pet. App. 9a.

Barnes has been involved in leasing and subleasing its coal reserves to third parties, and managing its investment portfolio. *Id.* at 10a.

5. Petitioners filed these actions against the Trustees of the Combined Fund and the 1992 Plan, challenging the constitutionality of the Coal Act under the Due Process and Just Compensation Clauses of the Fifth Amendment. The United States intervened to defend the constitutionality of the Act, pursuant to 28 U.S.C. 2403(a). In 1997, before this Court decided *Eastern*, the district court rejected petitioners' constitutional challenges and granted summary judgment for respondents. Pet. App. 61a-78a (*Unity*), 79a-95a (*Barnes*).

The district court first rejected petitioners' arguments that the application of the Coal Act to them violated substantive due process. It followed several appellate decisions upholding the constitutionality of the Coal Act against due process challenges, Pet. App. 68a-69a, 88a-89a, and concluded that "the Coal Act is rational economic legislation that comports with the substantive requirements of the Due Process Clause," *id.* at 88a. As for petitioners' claims that the Coal Act effected an uncompensated taking, the district court sustained the Act under this Court's three-factor test, set forth in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), for determining whether a regulatory measure gives rise to a taking. The district court noted that the Coal Act does not appropriate any property to governmental use but rather "acts to ensure the stability of a private fund," Pet. App. 75a, 93a; that, as measured by comparing their liabilities under the Act to their commitments under the NBCWAs or to the Benefit Trusts, the assessments upon petitioners are proportional, *id.* at 74a, 91a; and

that, as signatories to NBCWAs that explicitly promised lifetime benefits, Unity, its related companies, and Barnes participated in a system that fostered the miners' legitimate expectation of lifetime benefits and did not have a reasonable expectation of completely avoiding liability for those benefits, *id.* at 77a-78a, 94a.

6. While these cases were pending on appeal to the Third Circuit, a divided Court held in *Eastern Enterprises* v. *Apfel* that the Coal Act was unconstitutional as applied to a coal mine operator that signed NBCWAs in effect between 1947 and 1964, but ceased coal mining operations in 1965. See *Eastern*, 524 U.S. at 516-517 (plurality opinion) (recounting history of Eastern's involvement in the coal business). The Coal Act obligated Eastern to pay premiums to the Combined Fund to cover the health benefits of more than 1000 retired miners (or the dependents of the miners) who had worked for the company before 1966. *Id.* at 517 (plurality opinion). Eastern contended that the Coal Act violated substantive due process as applied to it and effected an unconstitutional taking of its property without just compensation by retroactively creating an obligation to finance the benefits of miners who, when employed by Eastern, had no expectation that they would receive open-ended health-care benefits at Eastern's expense.

The plurality concluded that the application of the Coal Act to Eastern effected an unconstitutional taking without just compensation. See *Eastern*, 524 U.S. at 524-527. Applying the Court's three-factor test for analyzing regulatory taking claims (*id.* at 523-524), the plurality found a constitutional problem as to each factor. In particular, the plurality found it significant that the Coal Act imposed liability on Eastern for lifetime health-care benefits even though Eastern had

withdrawn from the coal industry before any of the NBCWAs had promised lifetime benefits to the miners. See *id.* at 532 (with respect to the burden placed on Eastern, noting that Eastern "had no control over the activities of its former employees subsequent to its departure from the coal industry in 1965"); *ibid.* (with respect to investment-backed expectations, stressing that Eastern never participated in an industry-wide agreement creating expectations of lifetime benefits); *id.* at 532-533 (with respect to the nature of the governmental action at stake, stating that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised").

Justice Kennedy, concurring in the judgment and dissenting in part, disagreed with the plurality's conclusion that the Coal Act should be analyzed as a taking, see *Eastern*, 524 U.S. at 539-547, but concluded that the application of the Coal Act to Eastern violated "[a]ccepted principles" of substantive due process inhibiting the operation of severely retroactive laws, *id.* at 547-550. Justice Kennedy noted that "the imposition of liability on former employers based on past employment relationships" may be upheld under due process principles as remedial legislation designed to allocate properly the costs of the employer's business. *Id.* at 549. He concluded, however, that the Coal Act did not serve that purpose as applied to Eastern because, although "Eastern was once in the coal business and employed many of the beneficiaries, * * * it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy. * * * [T]he expectation was created by promises and

agreements made long after Eastern left the coal business." *Id.* at 550.

Four Justices dissented, and concluded that the Coal Act, as applied to Eastern, was not unconstitutional under either due process or taking principles. *Eastern*, 524 U.S. at 553-568. The four dissenting Justices agreed with Justice Kennedy that the Coal Act should not be analyzed as a taking at all. *Id.* at 554-557.

7. After this Court's decision in *Eastern*, the court of appeals in this case affirmed the grant of summary judgment to respondents. Pet. App. 1a-60a. In reaching that decision, the court observed that it was "difficult to distill a guiding principle from *Eastern*" because the rationale of Justice Kennedy's concurring opinion (relying on the Due Process Clause) was not a "narrower" ground of decision than the plurality's rationale (based on taking principles). *Id.* at 15a-16a. Given the "splintered nature" (*id.* at 15a) of the decision in *Eastern*, the court of appeals concluded that that decision "mandates judgment for [petitioners] only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Id.* at 16a. The court then held that the *Eastern* decision "is not on all fours with [this] case," *id.* at 17a, because petitioners herein signed NBCWAs in 1974 and thereafter, rendering them "factually distinguishable from *Eastern*." *Ibid.*[4]

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[4] Judge Aldisert agreed in a concurring opinion that "the decisive material facts" of the instant case and *Eastern* "bear no similarity" because in *Eastern*, "the company (1) left the coal industry in 1965 and (2) was never a party to the 1974 and later Wage Agreements that first suggested the commitment to lifetime benefits for retirees and family members," whereas petitioners "remained in the coal industry until 1981 and 1984 respectively, and

Those points, in combination with the "five-four vote against the takings claim" in *Eastern*, *ibid.*, led the court to conclude that "due process analysis encompasses the relevant concerns" when evaluating the constitutionality of the Coal Act as applied to petitioners. *Ibid.*[5]

With respect to petitioners' substantive due process claim, the court first considered whether "sufficient evidence exists to support Congress's judgment that post[-]1978 signatories of NBCWAs could justly be charged with responsibility for retirees' health benefits, based on the promises they made to coal miners and on the effects of their departure from the industry on the [1950 and 1974 Benefit Trusts]." Pet. App. 19a. After reviewing the history of the Trusts, including the fact that, "[u]nlike Eastern, * * * [petitioners] at some points in time negotiated for and adhered to the very agreements that established the benefit funds at issue," *id.* at 21a-22a, the court ruled "that Congress could reasonably have reached the conclusions it did about the expectation of lifetime benefits and about the coal companies' responsibility for the situation in which the [1950 and 1974 Benefit Trusts] found themselves after the changes of the 1970s and 1980s," *id.* at 28a. The court rejected petitioners' argument that holding them responsible for their miners' health-care benefits impermissibly obligated them, in effect, to remain in the coal business perpetually, and noted that the Coal Act

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participated in negotiations for the 1974 and later Wage Agreements." Pet. App. 54a-55a.

[5] The court separately considered and rejected petitioners' "categorical takings" challenge to the Coal Act, based on the contention that the application of the Act to petitioners would "entirely destroy[]" their businesses. Pet. App. 17a, 46a-53a. Petitioners do not renew that "categorical takings" claim in this Court.

"merely recognizes that all acts have consequences, and that sometimes it is not permissible for a company simply to walk away, leaving its former employees in the lurch." *Id.* at 23a.

The court also concluded that the duration of the Coal Act's retroactive operation in this case does not render it irrational in violation of due process. Pet. App. 38a. The court noted that the period of retroactivity applicable to petitioners' case is "significantly less extensive" than that in *Eastern*, *ibid.*, but it did not rely solely on the diminished retroactivity in this case, *id.* at 38a-39a. Rather, the court held, based on this Court's previous retroactivity decisions, that "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." *Id.* at 40a. Based on that approach, the court found the application of the Coal Act permissible in this case because "workers can be harmed * * * by an employer's failure to live up to a long-term promise that formed part of the worker's reasonable expectations on the job." *Id.* at 40a-41a.

The court distinguished the financial burden imposed by the Coal Act on petitioners (less than $1 million to date for Unity, and about $2.5 million per year for Barnes) from the liability at issue in *Eastern* (over $50 million), and observed that petitioners "are not in the same situation as Eastern Enterprises." Pet. App. 41a. Stating that "proportionality is the proper test of economic impact" to determine whether the retroactive application of a law is permissible, *id.* at 42a, the court found the "necessary proportionality" between the burden imposed on petitioners, on one hand, and, on the other hand, the former coal companies' "conduct that create[d] reasonable expectations about the object of the legislation [and] conduct that create[d] the pro-

blems that impelled the legislature to act." *Id.* at 42a-43a. In particular, the "expectation of lifetime benefits created by contractual language combined with the parties' consistent practices" and "the instability of the pre-Coal Act benefit funding structure to which the former coal companies contributed" provided a sufficient basis for the imposition of liability on petitioners. *Id.* at 43a.

In sum, the court held:

> Congress could reasonably determine that [petitioners], along with other coal operators in similar situations, placed the coal industry retiree benefit funds in jeopardy after creating an expectation of lifetime benefits. Moreover, the actions that created the need for the Coal Act are not so far in the past as to make it fundamentally unjust to impose liability upon [petitioners], because the burden is proportional to their contribution to the problem and the retroactivity is not too excessive.

Pet. App. 54a.

**ARGUMENT**

1. Petitioners contend (Pet. 14-23) that the obligations imposed on them under the Coal Act to finance the health-care benefits of their former employees (and those employees' dependents) violate the Due Process and Just Compensation Clauses of the Fifth Amendment. They contend, in particular, that the court of appeals' decision conflicts with *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), which held the Coal Act unconstitutional as applied to the coal mine operator who challenged the Act in that case. Those contentions are without merit. Petitioners' situation is fundamentally different from the position of the coal operator

before the Court in *Eastern*, because, unlike that operator, petitioners signed collective bargaining agreements in 1974, 1978, and beyond that promised their employees health-care benefits for life. The decision below therefore creates no inconsistency with *Eastern*.

The result reached by the court of appeals is also correct under well-settled taking and substantive due process principles, and it does not conflict with any decision of any other court of appeals. To the contrary, the only other court of appeals that has considered a constitutional challenge to the Coal Act since *Eastern* by companies that were bound by the 1974 and 1978 NBCWAs rejected that challenge, see *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998), and it did so based on a reading of the plurality and concurring opinions in *Eastern* that largely parallels that of the Third Circuit in this case. Further, this Court recently denied review in another case from the District of Columbia Circuit presenting the same challenges to the Coal Act. See *Holland* v. *Robert Coal Co.*, No. 97-5352, 1998 WL 794832 (D.C. Cir. Oct. 16, 1998), cert. denied, 119 S. Ct. 1803 (1999). There is no basis in this case for a different result. Further review is therefore not warranted.

a. Although the Court in *Eastern* did not arrive at a single rationale for finding the Coal Act unconstitutional as applied to Eastern, both opinions supporting the judgment in that case emphasized the fact that Eastern left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits. See 524 U.S. at 530-531, 532, 535-536 (plurality opinion); *id.* at 549-550 (opinion of Kennedy, J.).

This case, by contrast, presents a factual situation in which the coal operators signed NBCWAs promising

their employees lifetime benefits; thus, as the court of appeals concluded, "*Eastern* is not on all fours with [this] case." Pet. App. 17a. The result reached by the Court in *Eastern* therefore does not govern here. To the contrary, as the court of appeals observed, "[b]ecause [petitioners] signed NBCWAs in 1974 and thereafter, they are factually distinguishable from *Eastern Enterprises*. Language in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 supports [that] conclusion." *Ibid.*; see also *Association of Bituminous Contractors* v. *Apfel*, 156 F.3d 1246, 1257 (D.C. Cir. 1998) ("the clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability.").[6]

b. Petitioners' further contention (Pet. 14-17) that the court of appeals failed to apply the "retroactivity principles" supposedly endorsed by five Justices in *Eastern* is without merit. Petitioners submit (Pet. 14) that those principles are that "retroactive employee benefits funding legislation is unconstitutional if it imposes on employers a 'substantial' economic burden, based on conduct 'far in the past,' that is 'unrelated to any commitment that the employers made or to any injury they caused.'" Contrary to petitioners' conten-

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[6] Moreover, while the Coal Act required Eastern to begin paying premiums to the Combined Fund in 1993, even though the company had not contributed to the United Mine Workers Benefit Plans since 1965, the Coal Act requires petitioners to finance the health benefits of retirees who were covered by Unity's related companies until 1981 and by Barnes until the end of 1988. See pp. 6-8, *supra*; 26 U.S.C. 9712(b)(2) and (d)(3); cf. *Eastern*, 524 U.S. at 516 (plurality opinion).

tion, the court of appeals examined each of those factors in the context of the facts of this case and concluded that the retroactive scope of the Act, as applied here, is not beyond Congress's legislative power. Pet. App. 4a.

Thus, the court of appeals, expressly following this Court's decisions in *Eastern* and in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), examined the proportionality of the burden imposed by the Coal Act on petitioners and sustained that burden as permissible, noting that even "a large burden is not unconstitutional if the liability actually imposed is not out of proportion to the claimant's prior experience with the object of the legislation." Pet. App. 42a; see also *Connolly*, 475 U.S. at 226. The court of appeals ruled that petitioners' participation in the creation of miners' reasonable expectations of lifetime benefits under NBCWAs beginning in 1974, and in the establisment of a funding structure vulnerable to the excessive creation of "orphaned" retirees when companies left the industry, provided the requisite proportionality of burden to experience sufficient to sustain application of the Coal Act to these operators. Pet. App. 46a. The imposition of liability on petitioners, therefore, can hardly be considered "unrelated to any commitment that the employers made" (Pet. 14).

The court of appeals also correctly concluded that the extent of retroactivity present in this case is not so extreme as to contravene substantive due process. Pet. App. 39a. The court observed that, whereas the application of the Coal Act to Eastern resulted in at least 27 years' retroactive operation—from passage of the Coal Act in 1992 back to Eastern's exit from the coal industry in 1965–the extent of retroactivity at issue in this case is much less, only four years in the case of Barnes. *Ibid.* The court of appeals further noted that this Court

has held that "Congress may retroactively bar employers from giving their employees vested pensions in multiemployer plans and then leaving those plans to collapse." *Id.* at 40a. In contrast to Eastern, petitioners here participated in the creation of a reasonable expectation of lifetime benefits and left the benefit plans in a condition vulnerable to collapse. Accordingly, the periods of retroactivity applicable to the conduct of petitioners survive constitutional scrutiny.

Finally, the court of appeals properly found that the Coal Act was an appropriate congressional response to commitments participated in by petitioners, and was designed to remedy injuries caused by petitioners and similarly acting companies, which withdrew from the coal industry leaving "orphaned" miners and dependents without provision for adequate funding to meet the expectation of lifetime benefits. Petitioners' reliance upon *Eastern* to counter the court of appeals' conclusions in this regard is wholly misplaced. Pet. 17. The injuries that the Coal Act is intended to remedy are not physical harms suffered in "employment in coal mines," *ibid.*; rather, as the court of appeals observed, they are the harms caused by "dumping" retirees on the Benefit Funds, whose funding structures were vulnerable to such behavior. Pet. App. 46a.

2. Petitioners contend (Pet. 24-27) that the court of appeals incorrectly applied *Marks* v. *United States*, 430 U.S. 188 (1977), by failing to give controlling effect to the points of agreement between the plurality opinion and Justice Kennedy's opinion in *Eastern*, and by giving controlling effect to the points of agreement between Justice Kennedy and the dissenting Justices in that case. That contention is without merit.

*Marks* addresses the situation where a concurring opinion in this Court reaches the same result as that

reached by a plurality of the Justices, but on narrower grounds. In that situation, a lower court should follow the reasoning of the concurring opinion, because the lower court may conclude that a majority of this Court agrees with the narrower position reached by the concurrence. 430 U.S. at 193. To the extent that *Marks* provides any guidance here, it supports the court of appeals' rejection of petitioners' due process challenge. Even though the plurality and concurrence in *Eastern* analyzed that case under different legal frameworks, those opinions agreed on the constitutional significance of a particular fact, namely, that Eastern left the coal industry before 1974, when the NBCWAs began expressly stating that retired miners would receive health benefits for life. As we have explained, both the plurality and Justice Kennedy concluded that the crucial constitutional problem in *Eastern* was the Coal Act's application to an operator that had never signed a wage agreement promising lifetime benefits, and both found that situation distinguishable from the one where an operator had signed such an agreement. See pp. 9-10, *supra*. The court of appeals properly focused on that point of agreement between the plurality and Justice Kennedy in *Eastern* to reject petitioners' due process claim.

Petitioners' contention (Pet. 26) that the court of appeals improperly created a *Marks* majority out of Justice Kennedy's concurrence and the dissent in *Eastern* to reject their taking claim is also incorrect. That argument overlooks the reliance of both the plurality in *Eastern* and the court of appeals in this case on *Connolly* (including the three-part taking analysis of *Connolly*) in evaluating the constitutionality of the Coal Act as applied to petitioners. See *Eastern*, 524 U.S. at 529-532; Pet. App. 12a-14a, 22a, 26a, 29a, 40a, 42a-43a,

44a, 53a. Moreover, although the court of appeals analyzed this case principally under the rubric of substantive due process, it observed that "[t]o the extent that *Eastern* embodies principles capable of broader application, * * * due process analysis encompasses the relevant concerns." *Id.* at 17a. Thus, rather than fashioning the *Eastern* dissent into "the law of the land," as petitioners contend, Pet. 26, the court of appeals effectively applied the analytical scheme of the plurality in *Eastern* to the facts of this case. For the reasons given above, petitioners' claims fail even under the reasoning of the plurality opinion in *Eastern*, which emphasized that Eastern—unlike petitioners herein and other coal companies that signed the 1974 and later NBCWAs--never contributed towards any reasonable expectation of lifetime health benefits on the part of coal miners. The plurality opinion and Justice Kennedy's concurrence therefore form a majority rationale sufficient to reject petitioners' taking claim, and it is not necessary to rely on the dissenting opinion in *Eastern* (although it is also at least doubtful that *Marks* even addresses a situation such as the explicit agreement of the four dissenting Justices in *Eastern* with a concurring Justice's rejection of a particular constitutional claim).

3. Finally, petitioners contend that lower courts are divided about the elements of a taking claim outside the context of the Coal Act, Pet. 27-28, and that the "parameters for due process challenges" to regulatory legislation are uncertain, Pet. 28-29. Those contentions provide no basis for review in this case. The plurality and concurring opinions in *Eastern* identified the same critical characteristics that distinguished the operators that signed NBCWAs in 1974 and afterwards from those that did not, and both opinions found the connec-

tion of the latter group of operators to miners' expectation of lifetime benefits and the financial instability of the funds too attenuated to sustain the Act as applied to those operators. In view of that articulation of general agreement on the principles governing the constitutionality of the Coal Act in particular—principles that were followed by the court of appeals in this case and in the D.C. Circuit's decision in *Association of Bituminous Contractors*, *supra*—there is no basis for further review in a Coal Act case in order to address issues that might arise in *other* contexts in the future.

Petitioners' contentions about the other cases they cite are in any event without merit. Petitioners argue that the First Circuit, in *Parella* v. *Retirement Board of the Rhode Island Employees' Retirement System*, 173 F.3d 46 (1999), improperly relied on the concurrence and dissent in *Eastern* to conclude that a taking challenge will lie only when a "specific" property interest has been taken. In *Parella*, the court considered whether the plaintiff had any property right at all before conducting a taking analysis, and concluded on the facts of that case that the plaintiffs had a mere "expectancy interest" not protected as "property" under the Just Compensation Clause. See *id.* at 58-59. The *Parella* court did not conclude (as Justice Kennedy and the dissenting Justices would have held in *Eastern*) that the imposition of financial liability under a regulatory statute like the Coal Act, which imposes liability among private parties, is necessarily not a "taking." The *Parella* decision is therefore remote from this case. In *Central States, Southeast & Southwest Areas Pension Fund* v. *Midwest Motor Express, Inc.*, 181 F.3d 799 (7th Cir. 1999), petition for cert. pending, No. 99-420 (filed Sept. 7, 1999), the court of appeals followed the path of the plurality opinion in

*Eastern* and examined legislation challenged as a taking under the well-settled three-factor test set forth in *Connolly*, and observed that "*Eastern Enterprises* does not modify this traditional approach or suggest a different test." *Id.* at 808. In *Vermont Assembly of Home Health Agencies, Inc.* v. *Shalala*, 18 F. Supp. 2d 355 (D. Vt. 1998), the court assumed the existence of a property interest at stake, see *id.* at 369. None of those decisions reflects any confusion regarding the elements of a takings claim.

As for the "parameters for due process challenges" (Pet. 28), petitioners incorrectly suggest that the Court's emphasis in *Eastern* on the fact that retroactivity is "generally disfavored" (Pet. 29) constitutes a significant departure from the Court's previous substantive due process decisions according a heavy presumption of constitutionality to legislation (including retroactive legislation) that adjusts the burdens and benefits of economic life. To the contrary, the plurality opinion in *Eastern* emphasized the Court's longstanding "concerns about using the Due Process Clause to invalidate economic legislation," 524 U.S. at 537, and avoided resting its decision on the Due Process Clause. Justice Kennedy's concurrence did rely on due process principles, but that opinion did not discard the well-settled presumption of constitutionality for regulatory statutes; rather, Justice Kennedy found that presumption rebutted on the particular facts of the case in *Eastern*, which he considered to be a "rare instance[]" of "egregious circumstances." *Id.* at 550. For the reasons we have given, this case presents no comparable circumstances.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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